

1 derive anything from that?

2 A Sure. So, again, Golf and Versus
3 are affiliated. And they are there. So they
4 are fully owned by Comcast. And not only did
5 they skip the intermediate tier, but they got
6 put on the best tier.

7 And remember what the Commission's
8 findings was in the NBCU order, which is that
9 Comcast treats Golf and Versus more favorably
10 than any other MVPD -- okay? -- and when
11 controlling for same geographic areas and all
12 other things they could explain in their
13 carriage.

14 So Golf and Versus are getting
15 very good treatment. Indeed, they are getting
16 discriminated in favor of according to the
17 FCC.

18 Finally, you see ESPN again as the
19 counter-example, if you will. But, again,
20 it's the same story. I mean, ESPN is a
21 special animal. And it bucks the general
22 trend that I am observing in the data.

1 Q Without giving numbers, Dr.
2 Singer, could you give us a sense, for
3 example, of the difference in the amount, just
4 as a mathematical exercise, the difference in
5 the amount of subscriber fees charged by ESPN
6 versus, say, Golf, Versus, or even the Tennis
7 Channel?

8 A Well, it's been a bit since I have
9 seen the exact number that ESPN charges, but
10 I know that it is among the most expensive
11 programming that's available for MVPDs. It's
12 a month or something on that order. It's
13 very expensive.

14 And the networks that we're
15 talking about here, at least Tennis Channel is
16 in my mind. I'm just going to speak to the
17 publicly available data, states that the
18 average revenue per month is on the order of
19 15 cents in 2009.

20 MR. PHILLIPS: I'd like to, Your
21 Honor, approach, if I could, and hand out yet
22 one more exhibit that is essentially the same

1 chart with just a slightly different format,
2 as I will walk through.

3 JUDGE SIPPEL: Is this also
4 already in evidence in a different format?

5 MR. PHILLIPS: The one I gave you
6 before, Your Honor, is in evidence because
7 it's in his report. This one is not, although
8 it is exactly the same data, just slightly
9 different format.

10 JUDGE SIPPEL: Okay. this has been
11 marked as Tennis Channel exhibit 191.

12 (Whereupon, the aforementioned
13 document was marked for
14 identification as Tennis Channel
15 Exhibit Number 191.)

16 BY MR. PHILLIPS:

17 Q Now, Dr. Singer, have you seen
18 this chart, exhibit 191, before?

19 A I have.

20 Q And can you explain to me what
21 this chart purports to show?

22 A Well, I think it's the same

1 information that's on table 1 in my report.

2 It just removes all of the networks that do
3 not have an affiliation with Comcast.

4 Q So these are only the Comcast, the
5 networks that Comcast, has ownership of,
6 either fully or partially, correct?

7 A Correct.

8 Q And in the sports entertainment
9 tier, how many are there?

10 A There are none.

11 Q Now, Dr. Singer, isn't it possible
12 that the quality of the network explains why
13 networks Golf and Versus, for example, end up
14 on the digital preferred or digital starter
15 tiers?

16 A Well, that is certainly what
17 Comcast would have you believe. And it's
18 certainly -- as a theoretical matter, it's a
19 viable proposition.

20 And, just to kind of restate it in
21 layman's terms, they would say, "Look, it has
22 nothing to do with affiliation. It just so

1 happens that all the ones that are affiliated
2 get good treatment and the ones that are
3 unaffiliated get bad treatment."

4 But also what is really going on
5 is that it is higher quality. It is higher
6 quality of these that are on the affiliated --
7 that have made it through the other side of
8 the fence, that have gotten out of the
9 doghouse.

10 And that is a very difficult
11 proposition to rebut unless we have a natural
12 experiment. And, fortunately, we do have a
13 natural experiment. Economists like to put
14 fancy words on things. We call these fixed
15 effects models. But in English, the idea is
16 that if someone's attributes changed over the
17 course of time, we can see if the conduct that
18 was taken with respect to those entities
19 changed. And then we can be sure that it has
20 nothing to do with the underlying or
21 unobservable characteristics of the candidate.
22 But, instead, it's the treatment variable.

1 So let me now say that in English.
2 Okay? We have two very nice natural
3 experiments here, which is Major League
4 Baseball Network and NHL, the National Hockey
5 Network. Okay? What is so beautiful about
6 these experiments is that we had a period of
7 time in which these two networks were not
8 affiliated with Comcast. All right? And we
9 got to see how Comcast treated them when they
10 were not affiliated.

11 And then we had a period of time
12 in which they were affiliated with Comcast,
13 and we got to see how Comcast treated them
14 after they were affiliated.

15 The NHL Network is the easier
16 story to explain. They literally were on the
17 sports tier when they were an independent
18 network. And as soon as Comcast got equity in
19 the network, their behavior towards NHL,
20 towards National Hockey League Network,
21 changed. Okay? And they put them into the
22 digital preferred tier.

1 And now when Comcast starts to
2 say, you know, "It's the quality. It's the
3 innate quality of the network that's driving
4 our decisions," you have to ask yourself,
5 wasn't the quality the same? And if it was
6 the same, then quality can't be driving the
7 decision. It's got to be whether or not you
8 submit to their equity demands.

9 Now, the next one that's a little
10 -- well, it's less clean, but it's still I
11 think a very compelling story is the Major
12 League Baseball Network. There we don't get
13 to see a switch in -- we do get to see a
14 switch in affiliation. Okay? That's the good
15 news. We get to see a period in which they
16 did not, in which Comcast did not, have any
17 equity in them. And then we have an after
18 period in which Comcast did have equity in
19 them.

20 But we don't get to see a movement
21 across tiers -- okay? -- as we did for the
22 NHL. But we had something pretty darn close,

1 which is that Major League Baseball was
2 complaining vigorously in the public that it
3 couldn't get carriage better than sports
4 entertainment. That is, Comcast was only
5 willing to launch it on sports entertainment
6 unless it granted equity. And, sure enough,
7 as soon as it granted equity in Comcast,
8 Comcast launched it on the digital preferred
9 tier.

10 And so, in sum, I think those are
11 very nice what I call natural experiments that
12 allow the economist to really dig deep and
13 understand what is it that is driving Comcast
14 carriage decisions.

15 Q Dr. Singer, if I may, I want to
16 switch focus just a little bit with you for a
17 moment and take you back to something you
18 referred to a few minutes ago, the technical
19 appendix to the FCC report, which probably
20 requires a Ph.D. understand. And I want to
21 ask you if you are familiar with it and could
22 break it down for us.

1 A It is difficult to penetrate. And
2 this will certainly be a test of my
3 communications skills, but I will give it a
4 whirl. What --

5 JUDGE SIPPEL: Only compared to my
6 ability to listen, too.

7 THE WITNESS: Well, just please --
8 I had to read it about four times. So please
9 stop me if anything becomes unclear. But the
10 FCC borrowed a test from a professor at the
11 University of Chicago named Austan Goolsbee,
12 who now happens to be the chief economist at
13 the Council of Economic Advisers for President
14 Obama.

15 And Dr. Goolsbee came up with a
16 neat insight, which is, how can you test
17 whether or not -- what is causing a vertically
18 integrated MVPD like Comcast. What is causing
19 them to give preference to their own channels?
20 Are they doing it for efficiency reasons? Are
21 they doing it for anti-competitive reasons?

22 And this was his very interesting

1 insight and probably why he's the head of the
2 Council of Economic Advisers. He said we
3 could take advantage of the extent to which
4 they are giving favoritism to their own
5 networks to determine what is driving the
6 decision-making. That is, when we look out --
7 and this is what the FCC found, the first
8 finding, which is that when we look out and we
9 see how Comcast treats Golf and Versus, it is
10 carrying those networks more broadly than the
11 relevant comparators. That is, they're
12 in-region rivals controlling for all of the
13 things that, other things that, could explain
14 why they are carrying them the way that they
15 do.

16 Well, that Dr. Goolsbee figured
17 out is if the extent of the favoritism varies,
18 -- okay? -- that is, if we see more favoritism
19 in some markets and less favoritism in other
20 markets and if that variation can be explained
21 by Comcast market share, right, then depending
22 upon the relationship between the favoritism

1 and the Comcast market share, we can make a
2 determination as to whether Comcast is doing
3 this for pro-competitive reasons or
4 anti-competitive reasons.

5 And here is the insight. And here
6 is what the FCC found. The insight is that
7 there are costs to discriminating. And if
8 Comcast wants to incur those costs, it would
9 make sense to do and if it is doing it for
10 efficiency reasons, it would make sense to
11 pull those networks down to a more broadly
12 distributed tier so that more people could see
13 them in markets where it is facing more
14 competition. That is, to meet the
15 competition, if Comcast is doing this for the
16 right reason, we should seem them pulling Golf
17 and Versus down to the very most penetrated
18 tiers to really combat the competition that
19 they are facing from DirectTV, Dish, and either
20 AT&T or Verizon.

21 But if we see them pulling it down
22 to the broadest tiers in markets where they

1 face less competition, then they must be doing
2 it for anti-competitive reasons. Okay? This
3 is the key insight. And it took me four times
4 to read. And I'm happy to go back through
5 that again. But basically what the FCC found
6 is they were able to confirm that not only --
7 this is the easy part.

8 Not only was Comcast giving
9 preferential treatment to Golf and Tennis
10 vis-a-vis its MVPD rivals -- okay? -- but it
11 tended to carry them more broadly in markets
12 where it faced less competition. Therefore,
13 they concluded that they must be doing it,
14 Comcast must be doing this, for
15 anti-competitive reasons.

16 I'm going to stop talking and let
17 you ask the next question.

18 MR. PHILLIPS: I will try.

19 BY MR. PHILLIPS:

20 Q Did you take that analysis that
21 Professor Goolsbee had done and try to apply
22 it in any way in this case?

1 A I did. What I tried to figure out
2 is what would be the analogue for an
3 unaffiliated or independent network. Right?
4 So what I wanted to see was in most of the
5 cases; in fact, in percent of the cases,
6 Comcast carries the Tennis Channel on its
7 sports tier, but, for some reason, in roughly
8 percent of its markets, it moves Tennis
9 Channel off the sports tier and puts it on a
10 better tier.

11 And I wanted to see if that
12 decision to basically deviate from the norm,
13 right -- I'll just repeat again in percent
14 of the cases, Tennis Channel is carried by
15 Comcast on its sports tier. In percent of
16 the markets, for some reason, Comcast pulls it
17 off.

18 What I wanted to see was when they
19 pull it off and put it on a more broadly
20 distributed tier, are they doing it to meet
21 the competition? And it turned out that
22 Comcast share, which is a proxy for how much

1 competition they were facing, seemed to
2 explain again Comcast decision-making here.

3 And so this is very complicated,
4 but to put a big bow around this whole thing,
5 what I am observing and consistent with what
6 the FCC is observing is that competition is
7 the elixir that solves all of these problems
8 of vertical integration. If only we had -- I
9 mean, one solution to this entire morass that
10 we're in right now would just be an injection
11 of downstream competition.

12 What happens is when Comcast gets
13 exposed to competition, it doesn't give as
14 much preference to its own. Okay? And it
15 doesn't give as worse treatment to the
16 independents. All right? That's what we're
17 finding in a nutshell.

18 Q And how did you come to that
19 conclusion?

20 A Well, exactly what I told you,
21 that it's -- when you look -- when you compare
22 the percent of markets that -- in which

1 carries Tennis Channel on the sports tier to
2 Comcast's average market share in the markets
3 in which Comcast carries Tennis on a better
4 tier.

5 And that difference, that
6 percentage point difference, was statistically
7 significant.

8 Q Now, were the findings that you
9 had on this particular analysis consistent
10 with the findings that you had made in the
11 rest of the opinions?

12 A Yes. Everything that I -- yes, it
13 is. And we're going to probably go through
14 more evidence, but it is all consistent. This
15 is all kind of building a case or kind of
16 causing me to give greater credence to the --
17 what I call the anti-competitive hypothesis,
18 which is that Comcast is not only treating
19 Tennis Channel worse than its affiliated
20 networks, but it's doing it for the wrong
21 reasons.

22 Q As part of that anti-competitive

1 hypothesis, Dr. Singer, what else did you look
2 at? You also looked at whether they were
3 similarly situated?

4 A That is correct. I mean, you have
5 to do that. Obviously you can't have
6 discrimination if you go back to the
7 definition that I gave. You can't have
8 discrimination unless you are treating two
9 similarly situated things differently.

10 So I did look at everything that I
11 could on discrimination -- on similarly
12 situated.

13 Q And what were you comparing in
14 order to determine whether they were similarly
15 situated?

16 A Right. The way that I interpret
17 similarly situated is you have to say from the
18 perspective of whom.

19 Q I'm sorry, Dr. Singer. But what
20 networks were you comparing?

21 A Oh, I didn't get that from the
22 question. I'm sorry.

1 Q That's fine.

2 A I was comparing Tennis Channel to
3 Comcast's wholly owned national sports
4 networks of Versus and Golf.

5 Q And what did you look at to try to
6 determine whether they were similarly
7 situated?

8 A Right. So, again, what I wanted
9 to try to determine was, are these three
10 networks similarly situated from the
11 perspective of the various constituencies that
12 matter in this market? And the constituencies
13 that matter are viewers, advertisers, and
14 MVPDs -- sorry -- rights holders.

15 Let me say there are four
16 constituencies here and three of whom I
17 analyzed in the similarly situated section.
18 And let me just go back for the record to be
19 clear: viewers, advertisers, and the rights
20 holders.

21 Q And with respect to viewers, what
22 did you find?

1 A I found that viewers perceive the
2 content on these networks to be similarly
3 situated. In fact, the viewers themselves are
4 similarly situated, are similar based on the
5 evidence that we have seen here.

6 You know, we have heard testimony
7 today that puts them in the same age bracket
8 that suggests that they are more affluent than
9 the average American family, that they tend to
10 skew slightly -- well, they all tend to skew
11 male, some of them more than others.

12 I think the viewers had other
13 things in common, too. They participated in
14 the sports that they were watching. I thought
15 that was very important. There's a Simmons
16 survey that shows what percentage of Tennis
17 Channel viewers participate in golf and in
18 tennis and what percentage of Golf Channel
19 viewers participate in tennis and in golf.
20 And the numbers didn't surprise me. It was
21 exactly what I would expect.

22 The judge made an interesting

1 observation about his days as a caddy I think
2 on Monday, which is that he remembers these
3 sports basically being played next to each
4 other. And that was the exact impression that
5 I had when I came to the case, that, boy, you
6 know, if you think about serving up and of
7 leisure sports, what sports constitute the
8 leisure sports?

9 An important thing is that Comcast
10 has its own classification system in its 10-K
11 for these two networks. And I think this is
12 very important. They use the words "sports
13 and "leisure networks." That's Comcast's own
14 words. That's how they describe Golf and
15 Versus.

16 And I can't think of a better way
17 to describe Tennis Channel. These are leisure
18 sports. You are aiming at a particular
19 demographic, an affluent, kind of upper class
20 demographic that has the luxury of consuming
21 leisure. And it was just kind of clear to me
22 that the viewers are very close here.

1 Q What about advertisers? What did
2 you find with respect to advertisers?

3 A Well, you know, advertisers are
4 just trying to hit those viewers. So the
5 extent that the viewers are similar means that
6 the advertisers perceive, you know, the
7 viewers on these various networks to be close.
8 We heard testimony today that advertisers have
9 a sports budget. And there's a fight for
10 share of that budget.

11 And what's neat about sports that
12 we heard is that you get to hit a demographic
13 that is different from the generic demographic
14 that you hit when you otherwise advertise on
15 television. You have more males. You have a
16 lot of money. And people in those categories
17 tend to spend a lot of money on your wares.

18 Q What about the chart that we
19 showed earlier that shows that there are
20 actually -- overlapping advertisers not only
21 belong in the sports networks but a huge
22 number of them.

1 A Oh, right. Well, just to orient,
2 so my interpretation of that evidence is that
3 Tennis Channel might be competing with lots of
4 networks besides Golf and Versus. I don't
5 know if there's any requirement here that
6 Tennis Channel must only compete with Golf and
7 Versus. It is conceivable that they are
8 stealing share from ESPN or even news network
9 or other networks.

10 But the overlap that I looked at,
11 which is saying that the overlap that was
12 sponsored by Mr. Herman, I believe, I thought
13 that evidence was certainly consistent with
14 the notion that the advertisers themselves are
15 similar.

16 Q And did you draw any conclusions
17 about programming overlap?

18 A I did. And this is the stuff
19 that, frankly, I couldn't know or have any
20 feel for until I kind of really got into the
21 case, but I always had the impression that
22 golf and tennis were going to be the ones that

1 were clearly similarly situated.

2 And I was always saying, how are
3 we going to demonstrate? How could this be
4 Versus, right, as Mr. Carroll described Versus
5 yesterday? He called it the vicious or the --
6 I can't remember -- vicious or violent
7 channel, although, as an aside, the Tour de
8 France and cycling isn't necessarily all that
9 violent but --

10 JUDGE SIPPEL: It is more blue
11 collar, I guess you would say.

12 THE WITNESS: Some of the sports
13 are more blue collar. That is precisely
14 right, the cage fighting, which I'll just
15 leave it at that. But, in contrast, the
16 cycling is not.

17 But here is what really opened my
18 eyes on this notion of similarly situated.

19 JUDGE SIPPEL: Rodeo riding, too,
20 by the way. Is that what they call it: rodeo
21 riding?

22 THE WITNESS: Bull riding?

1 JUDGE SIPPEL: Bull riding.

2 THE WITNESS: Yes.

3 JUDGE SIPPEL: That's on there,
4 too, isn't it?

5 THE WITNESS: Yes, very violent.

6 What really impressed me and
7 really kind of nailed the inquiry on similarly
8 situated was, just as in the NFL case, where
9 Versus and NFL were competing for the same
10 content, NFL Thursday night football games, we
11 have documentary evidence here and admissions
12 by Comcast finally that Versus is competing
13 for the same tennis programming as the Tennis
14 Channel.

15 To me, that is dispositive. I
16 certainly want to look at other evidence and
17 make sure that we can check the boxes on the
18 other constituencies. But let me just roll
19 through the evidence on that.

20 We know that Versus aired World
21 Team Tennis as recently as 2008. We know that
22 Versus competed against, directly competed

1 against, Tennis Channel for the rights to the
2 U.S. Open. We got to see their planning
3 documents for that bid in the analysis that
4 was associated with it. And now Comcast is --

5 MR. PHILLIPS: Dr. Singer, before
6 you go into now, I think what you are about to
7 go into, in fact, is highly confidential,
8 unfortunately.

9 THE WITNESS: I don't think it --
10 well, why don't -- I don't the person from
11 Warren is here. And then if he's not here, is
12 there any --

13 MR. PHILLIPS: Is there anyone
14 here that is not covered by the protective
15 order?

16 MR. CARROLL: I have no concern
17 about this whatsoever.

18 MR. PHILLIPS: Okay.

19 BY MR. PHILLIPS:

20 Q Please proceed.

21 JUDGE SIPPEL: I should clarify
22 one thing because I was quoted here by an

1 economist as to what I said. That's true.

2 When I caddied, there was a big country club
3 up on the hill. And on one side will be the
4 tennis courts. And then the first tee was on
5 the other side. And I was on the other side,
6 of course, with the caddying.

7 And there were two types of people
8 that would play on the golf course: the
9 people from the country club, people that were
10 staying in a very fine hotel by the lake; and
11 then there were the regulars from downtown.
12 Maybe you want to call them townies for
13 nothing better.

14 And it was an entirely different
15 class. I mean, they were the good golfers.
16 They were regular golfers. But they talked a
17 different language. I mean, I learned as a
18 young man how to make adjectives into verbs
19 and things like that, you know.

20 (Laughter.)

21 JUDGE SIPPEL: So there is some --
22 that is only my experience, but there are some

1 differences.

2 THE WITNESS: Let me just make --
3 can I just make --

4 JUDGE SIPPEL: Of course, I can't
5 speak for that same distinction with tennis.
6 I don't think it's going to be --

7 THE WITNESS: Can I make a
8 clarifying comment?

9 JUDGE SIPPEL: Yes, I think make
10 --

11 THE WITNESS: Well, let me just
12 say this. I did not mean to suggest that
13 every viewer of golf has a certain income and
14 every viewer of tennis has -- or participant
15 in tennis has a certain income.

16 But what we do know is that their
17 average income is very close to each other
18 according to two different surveys that were
19 computed, that were performed in this
20 proceeding.

21 We have a -- I'm going to --
22 Mendelson and MRI I think are the two sources,

1 but, in any event, there are outfits that go
2 out and get income for Tennis Channel viewers
3 and for Golf viewers and then take averages
4 and compare them. And we actually get to see.

5 In the Mendelson survey, this is
6 -- I'm -- I know that I cited the MRI, but
7 Mendelson I just read in Mr. Brooks'
8 testimony. I think the numbers were 140,000
9 of it each for Tennis Channel and for Golf.
10 It's high.

11 Now, of course, that survey is
12 skewed slightly upward because they only
13 interview people with income over 100,000 --
14 okay? -- because it's their survey of affluent
15 homes.

16 But in another survey, MRI, I
17 think the incomes were in the mid '80s.

18 JUDGE SIPPEL: Well, I mean, I
19 would think that there is only a small
20 percentage of people in the overall country
21 that make that kind of money, surprisingly.
22 Am I right?